## Opinions Below

The opinion and judgment of the New York Court of Appeals was rendered on February 18, 1970, with Chief Judge Fuld and Judge Burke dissenting. The majority and dissenting opinions in the New York Court of Appeals have not yet been officially reported, and are set forth in the Appendix, *infra,* pp. 1a-18a. No written opinion or memorandum was handed down by the Appellate Term. The opinion of the Criminal Court of the City of New York, New York County, and the dissenting opinion of Judge Basel are reported at 53 Misc. 2d 717, 279 N.Y.S. 2d 680 (1967) and are set forth in the Appendix, *infra* at pp. 19a-30a.

## Jurisdiction

This is an appeal from a conviction of violating Section 1425(16)(d) of the Penal Law of the State of New York. The judgment of the Court of Appeals of the State of New York was entered on February 18, 1970. Notice of Appeal was filed on May 7, 1970.

Jurisdiction in the Supreme Court to review the decision of the New York Court of Appeals by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Street* v. *New York,* 394 U.S. 576 (1969); *DeVeau* v. *Braisted,* 363 U.S. 144 (1960); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957).

## The Statute

The validity of the statute under which appellant was convicted, Section 1425 subdivision 16, d. of the Penal Code of New York, which is presently codified as Section 136 of the General Business Law, is questioned on this appeal. The statute is set forth in the Appendix at pp. 48a-49a.

## Questions Presented

1. Does the First Amendment to the United States Constitution permit the punishment of artistic expression on the ground that it has been found to be contemptuous of our national symbol?

2. Does the statute under which appellant was convicted further any governmental interest other than fostering respect for the flag, and is the interest which is furthered by the statute unrelated to the suppression of free speech?

3. Is the prohibition against casting contempt upon the flag in the statute under which appellant was convicted sufficiently clear, certain and limited to meet the requirement of the Fourteenth Amendment that criminal activity be specifically defined?

4. Does the equal protection clause of the Fourteenth Amendment bar the conviction of appellant for displaying sculpture in an art gallery under a statute which permits magazine and newspaper publishers to show photographs of that sculpture in their publications and permits exhibition of paintings on the same theme?

## Statement of the Case

Appellant, Stephen Radich, is the proprietor of an art gallery. The gist of the crime for which he was convicted was that he displayed certain sculptures, called constructions, in his art gallery, which had been created by an artist named Marc Morrel and which utilized the American flag or what appeared to be the American flag (R. 5).*

Appellant was served with a summons in his gallery by a police officer (R. 10). At the trial, the complaining police officer testified that from the street he had observed one of the sculptures in the window of the second floor gallery (R. 9); that he had seen that sculpture and others when he entered the gallery with a police photographer who photographed the works (R. 11-16) (the photographs were introduced into evidence at People's Exhibits 1-9); that appellant and one other person were present (R. 16); and that anti-war music was being played (R. 125). There was no testimony of disturbance or disorder or circumstances which might lead to disorder (R. 17).

Two witnesses, appellant (R. 69-102) and the Art News Editor of the New York Times, Mr. Hilton Kramer (R. 107-130) testified for the defense. As experts in the art field (R. 71, 107-110), they stated their opinion that contemporary artists use many unconventional materials and frequently mix materials, so that there is today no distinct line between sculpture and painting (R. 72–R. 112-113); and that the sculptures or constructions were art (R. 67, 113)—a form of protest art in the tradition followed by

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* All citations are to the certified copy of the Record which has been filed with the Court.

Goya, Michelangelo and Picasso (R. 78-79). Appellant also testified that he did not intend to express contempt for the flag by exhibiting the sculpture (R. 80).

## How the Federal Questions Are Presented

The Federal questions sought to be reviewed in this Court were raised at trial in the Criminal Court of the City of New York by motion to dismiss the complaint at the close of the People's case. Appellant's grounds for dismissal included his contention that the statute unconstitutionally denied defendant equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution in that pictures, newspapers, books and magazines were excepted from its prohibitions (R. 39-40); that it violated the First Amendment's guaranty of free speech which protects sculpture as well as words (R. 40-44); and that the statute is unconstitutionally vague (R. 45-46).

The Court passed on those constitutional questions in finding appellant guilty of the charge, stating specifically that the statute did not violate the equal protection clause of the Fourteenth Amendment (R. 147), or the freedom of speech guarantee of the First Amendment (R. 148-149); that the statute was not so vague as to violate the due process clause of the Fourteenth Amendment (R. 150); and that no intent to violate the statute was required (R. 150).

The constitutional questions were raised on appeal to the Appellate Term and to the Court of Appeals of the State of New York. The Court of Appeals opinion commences by stating that the issue on appeal is "whether defendant's conviction of a violation of New York's flag desecration statute was in contravention of his right of free speech

under the First Amendment to the Constitution of the United States."

Stating that "the constitutional question in respect of the proscribed defilement by an 'act' rather than by 'words' was expressly left open in *Street* v. *New York* (394 U.S. 576, 594)." (App. p. 1a), the majority opinion concluded that appellant communicated "ideas by conduct" in a form which threatened public safety and therefore his conviction did not infringe the First Amendment (App. p. 4a).

Appellant's other constitutional objections were specifically rejected: "The statute is not unconstitutionally vague" (App. p. 12a); "even if we assume defendant had an honest political intent . . . or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum*" (App. p. 12a); "No less tenuous is appellant's claim of denial of equal protection . . ." (App. p. 12a).

**The Questions Are Substantial**

Concurring in the dismissal of the appeal in *Cowgill* v. *California*, —— U.S. ——, 38 USLW 3266 (Jan. 20, 1970), Mr. Justice Harlan stated:

> ". . . the issue tendered by appellant—whether symbolic expression by displaying a 'mutilated' American flag is protected from punishment by the Fourteenth Amendment—is one that I cannot regard as insubstantial. See *Street* v. *New York*, 394 U.S. 576, 594."

Mr. Justice Harlan concurred in the dismissal of Cowgill's appeal because the record did "not adequately flush the narrower and predicate issue of whether there is a

recognizable communicative aspect to appellant's conduct which appears to have consisted merely of wearing a vest fashioned out of a cut-up American flag."

The communicative aspect of appellant's "conduct" in this case was recognized in the opinion of the Court of Appeals affirming his conviction. Appellant was convicted for exhibiting in an art gallery "certain 'constructions,' comparable to sculptures, which had been fashioned by an artist as expression of protest against the Vietnam war and which, in each case, prominently incorporated the American flag" (App. p. 2a).

The dissenting opinion viewed the sculpture exhibited by appellant as pure expression, equal to words in its claim to First Amendment protection: ". . . the State may not legitimately punish that which would be constitutionally protected if spoken or drawn simply because the idea has been expressed, instead, through the medium of sculpture" (App. p. 16a).

If the dissenters' view is accepted by this Court, its decision in *Street* v. *New York, supra*, requires summary reversal of appellant's conviction. Since appellant believes that no meaningful distinction may be drawn, in a constitutional sense, between verbal speech and protest sculpture involving the flag, such a summary reversal would not be inappropriate. In any event, the record in this case is suitable to bring the question considered substantial by Justices Harlan and Stewart before this Court in a context of major importance to artists and those concerned with artistic expression.*

* In that regard, the Museum of Modern Art and the New York State Council on the Arts have requested counsel to inform the

This case is a continuation of a series of judicial explorations into the constitutional implications of state statutes prohibiting uses of the flag which are considered to be contemptuous, defiant or defiling. E.g., *Street* v. *New York,* 394 U.S. 576 (1969); *Hodsdon* v. *Buckson,* —— F. Supp. —— (D.Del. March 18, 1970) Appendix, *infra* at pp. 31a-44a; *Long Island Vietnam Moratorium Committee* v. *Cahn,* currently pending (E.D.N.Y. 1970); *Frain* v. *Baron,* 307 F. Supp. 27 (E.D.N.Y. 1969); *Halter* v. *Nebraska,* 205 U.S. 34 (1907). In each case, the basic dilemma has been the extent to which a free society may compel respect for its flag.

In a free society no person may be compelled to perform obeisance to a symbol of the state, by being forced to salute it, *West Virginia* v. *Barnette,* 319 U.S. 624 (1943); or, by being forced to treat it as though it were a sacred totem. *Hodsdon* v. *Buckson, supra* (App. p. 31a).

## I.

**The First Amendment prohibits punishment of artistic expression on the ground that it has been found to be contemptuous of the flag.**

A work of art, whether it be a poem, a novel, a play, a painting, a cartoon drawing or a piece of sculpture is a form of expression protected by the First Amendment. *Roth* v. *United States,* 354 U.S. 476, 487 (1957). Two and three dimensional art forms have, throughout history, ex-

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Court that, should jurisdiction of this appeal be accepted, they plan to file briefs *amici curiae* with the Court seeking reversal of the conviction.

pressed political ideas. Artists have traditionally raised their "voices" in social protest:

> "They have used the most effective weapon at their command—their art—to needle the Establishment, duel with oppressive governments, satirize corrupt or indifferent churches, strip bare the foul futility of war, attack exploitation, uncover the bleak existence of the poor, and in general to make visual comment on human folly in its infinite variations." Shikes, *The Indignant Eye: The Artist as Social Critic* (Boston, 1969, Introduction, p. xxiii).

Nevertheless, the Court of Appeals of the State of New York has affirmed appellant's conviction for publicly expressing opinions by means of flag sculpture on the ground that the art work invited its audience "to join in the protest, or in counterprotest, with the consequent potential of public disorder" (App. p. 5a).

As this Court stated in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), in holding unconstitutional a ban against black armbands worn as an expression of opposition to the Vietnam War:

> ". . . in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the view of another may start an argument or cause a disturbance. But our Constitution says we must take this risk. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949)." 393 U.S. at 508.

No exception to the Constitutional mandate may be, or has been, made where the flag is the symbol utilized. In *Street* v. *New York,* 394 U.S. 576 (1969), this Court ruled that contemptuous language directed at the flag could not constitutionally be made the basis for criminal punishment. Mr. Justice Harlan, writing for the Court, stated:

> "We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse and even contrary' and the 'right to differ as to things that touch the heart of the existing order' encompass the freedom to express publicly one's opinions about the flag, including those opinions which are defiant or contemptuous." *Id.* at 592-593.

In so holding, the Court was merely reaffirming the doctrine, enunciated in *Stromberg* v. *California,* 283 U.S. 359 (1931), that the display of flags and banners is fully protected by the First Amendment.

In *Hodsdon* v. *Buckson,* —— F. Supp. —— (D. Del. March 18, 1970), reproduced *infra* at Appendix, pp. 31a-44a, a three judge United States District Court repudiated the concept that non-verbal communicative activity involving the flag was not entitled to the plenary protection of the First Amendment. Judge Seitz, writing for the Court, stated:

> "The crucial issue, therefore, is whether, although the state may not . . . punish words defiant or contemptuous of the flag, it may nevertheless punish acts which convey identical ideas.
>
> "Expression is not confined to the spoken and written word. A court may take judicial notice of the symbolic significance of particular acts . . . . Thus, although

acts are not beyond regulation because they have symbolic components, in the absence of factors justifying limitation, symbolic speech is constitutionally protected" (App. 37a-38a).

The Delaware District Court, rejecting the notion that the state interest in preventing breaches of the peace justified Delaware's flag statute (which is identical in all material respects to the New York statute at issue herein), declared the statute unconstitutionally overbroad.

## II.

**The only governmental interest furthered by the statute is respect for the flag which interest cannot be furthered without violating the First Amendment.**

In *Board of Education* v. *Barnette*, 319 U.S. 624 (1943), this Court held that the state could not compel respect for the flag.

The Court below attempted to distinguish this case from *Barnette* and from *Stromberg* v. *California*, 283 U.S. 359 (1931):

"However, the statutes prohibiting certain kinds of exhibition of foreign flags, and statutes requiring the salute to our flag (Cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624) are clearly designed for no other purpose than communicative suppression whereas a flag desecration statute is aimed at keeping the peace. While it is true that violations of the flag desecration statute will probably not occur apart from the expression of an idea, the prime reason for the statute was not to insure suppression of such ideas, but

rather to insure preservation of the public peace" (App. 11a).

There is nothing in the statute to support that distinction; the statute in *Stromberg* could have been justified on the same ground. New York's flag desecration statute is not phrased, and has not been construed, to require a finding of public disturbance, or an imminent breach of the peace.[1]

If preserving the public peace was the primary objective in prosecuting appellant, he could have been charged under New York's disorderly conduct statute. However, a conviction under that statute would not have been sustained. The exhibition in question occurred in the quiet surroundings of a second floor art gallery in midtown Manhattan. It is difficult to conceive of a forum within which the expression of ideas would be less likely to lead to a breach of the peace. As Chief Judge Fuld stated:[2]

> ". . . I do not understand how it may reasonably be said that the mere display of Morrel's constructions in an art gallery, distasteful though they may be, poses the type of threat to public order necessary to render such an act criminal. This prosecution, in my view, is nothing more than political censorship falling far out-

[1] The statute under which appellant was convicted was entitled "Malicious Injury to and Destruction of Property"; it is now codified under Article 9B of the General Business Law entitled "Uses of Names and Symbols" as Section 136 "Exhibition or Display of the Flag." The codifiers have apparently not recognized it to be a disorderly conduct statute.

[2] It is interesting to note that the dissent in the Court of Appeals was written by Chief Judge Fuld, who wrote for that court in upholding the conviction in *Street*.

> side our holding in *People* v. *Street*, and may not be constitutionally sustained." —— N.Y.2d —— (App. p. 18a).

To deny, as has the Court below, plenary constitutional protection to protest art because its subject is the flag is to narrow the protection of the First Amendment to those ideas approved by the majority. A potentially hostile audience cannot serve to change the expression of ideas to criminal conduct. *Tinker* v. *Des Moines, supra; Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Bachellar* v. *Maryland*, —— U.S. ——, 38 U.S.L.W. 4316, 4317 (April 20, 1970).

The rationalization of the Court of Appeals below finds no support in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The governmental interest furthered by the statute prohibiting draft card burning was held to be preservation of draft cards to facilitate administration of the draft. The same kind of analysis of the flag desecration statute would show that the governmental interest furthered by the flag desecration statute is only respect for the flag.

Appellant was convicted because he "cast contempt" on the flag. The statute does not forbid the exhibition of sculpture; it forbids the message communicated by that sculpture. Casting contempt is, by definition, expressing an opinion, and casting contempt on the flag involves invariably, the expression of a political opinion.

Has the state a valid interest in punishing contempt for the flag? New York's statute, as applied by the court below, protects no state interest other than compelling veneration for the flag. Respect for the flag cannot be

compelled in a free society. *West Virginia* v. *Barnett,* 319 U.S. 624 (1943); *Street* v. *New York,* 394 U.S. 576 (1969).

## III.

**New York's flag desecration statute is unconstitutional on its face because it is unclear, uncertain and overbroad in violation of the Fourteenth Amendment.**

Appellant has been found guilty under a statute which makes it a crime to "cast contempt" upon the flag. This standard for criminality is entirely inadequate to meet the constitutional requirements which have been established by this Court.

In *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952), a ban on "sacrilegious" motion pictures was approved by the New York Court of Appeals. In reversing, this Court said:

> "New York's highest court says there is 'nothing mysterious' about the statutory provision applied in this case: 'It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . . ' This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea and a myriad of conflicting currents of religious views . . . " 343 U.S. at 504-505.

The criterion established by the statute in *Burstyn* was whether a religious theme was treated in such a manner as to offend the religious beliefs of any group of persons. The criterion established by the flag desecration statute—whether a political symbol is treated in such a manner as to offend the political beliefs of any group or person—is equally vague and offensive under our Constitution.

Governmental regulations which fail to apprise the public of the scope of their proscriptions violate the Fourteenth Amendment, e.g., *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). The uncertainty inherent in the statute under which appellant was convicted is particularly disturbing because it affects communication. The decision of the trial court below illustrates the danger in permitting such imprecise statutes. The majority opinion states:

> "If he [the defendant] wishes to approach the brink of what is proscribed he necessarily gambles on an adverse finding by the court." 279 N.Y.S. 2d at 685.

However, it is entirely contrary to the holdings of this Court to require a person to "gamble" on whether a particular form of expression is or is not permitted. To require such a "gamble" inevitably inhibits free expression. E.g., *Smith* v. *California*, 361 U.S. 147 (1959) at 151; *NAACP* v. *Button*, 371 U.S. 415 (1963), at 432-433.

As applied in this case, the chilling effect upon the free dissemination of ideas of the vague statutory language is enhanced by the fact that the statute has been construed to require no finding of appellant's intent to cast contempt upon the flag.

Appellant testified that he did not intend to cast contempt upon the flag by exhibiting the sculpture (R. 80), and that in fact he thought the artist might be expressing, not contempt for the flag, but contempt for those who were using the flag for aggressive purposes. The trial court held no intent to violate the statute was required for conviction (R. 150). The Court of Appeals specifically affirmed that holding: " . . . but even if we assume that defendant had an honest political intent in exhibiting these constructions, or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum*" (App. p. 12a).

Intent is a necessary element for a conviction in all cases involving the First Amendment. *Smith* v. *California,* 361 U.S. 147 (1959).

A basic policy underlying the "void for vagueness" doctrine is that no governmental regulation, especially in the First Amendment area, may vest an official with discretion to determine whether or not given conduct falls within its purview. E.g., *Connally, Commissioner* v. *General Construction Company,* 269 U.S. 385 (1926); *Cox* v. *Louisiana,* 379 U.S. 536 (1965). Such a policy is designed to protect against arbitrary and unequal enforcement of penal statutes in the sensitive area protected by the First Amendment. *Cox* v. *Louisiana,* 379 U.S. 536 (1965) at 557. *Thornhill* v. *Alabama,* 310 U.S. 88 (1940) at 97-98; *Kunz* v. *New York,* 340 U.S. 290 (1951); *Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *NAACP* v. *Button,* 371 U.S. 415 (1963) at 433.

The recent history of New York's flag desecration statute bears painful witness to the wisdom of the rule enunci-

ated in *Thornhill*. Unfortunately, it appears that the flag veneration statute has been enforced with particular vigor against persons expressing dissenting views. Despite the widespread use of the flag in commercial contexts and in connection with orthodox political activity, counsel are aware of no prosecution for such activity.[3]

This Court has consistently refused to uphold a penal statute when conduct protected by the First Amendment may be deemed by local law enforcement officials to fall within the terms of its proscription. Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. of Pa. Law Rev. 67 (1960). Such overbroad statutes have been held to violate the constitution because they invite local law enforcement officials to suppress constitutionally protected conduct in the mistaken belief that such conduct is prohibited by the statute in question.

As the Court pointed out in *Hodsdon* v. *Buckson,* —— F. Supp. —— (D. Del. 1970), the Delaware statute which is

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[3] The following incidents reveal that the capacity for abuse inherent in New York's vague flag desecration statute has not been ignored.

In Claverack, New York, a young man was arrested for driving a red, white and blue Volkswagen (he also has a brown beard). *People* v. *Pregaskis,* currently pending in Claverack Justice of the Peace Court.

In Happaugue, New York, a young housewife was arrested and held on $500 bail for flying her American flag upside down to protest the Vietnam War. The Nassau County District Attorney is appealing from the dismissal of her case. *People* v. *Hubner,* Nassau District Court. No action was taken, however, when the neighboring Rockville Centre American Legion flew its American flag upside down to protest government inaction concerning the Pueblo incident. *Newsday,* February 5, 1968, p. 15.

The District Attorney of Nassau County has threatened to arrest any person found displaying the emblem of Women Strike for

identical to the New York statute at issue herein, is capable of application to an infinite variety of expressive "conduct," ranging from flag burning to flying one's flag at half mast to unorthodox gestures aimed at the flag. The existence of so broad a proscription impinges upon areas which are protected by the First Amendment and therefore renders the statute unconstitutional.

## IV.

**The equal protection clause of the Fourteenth Amendment bars the conviction of appellant for displaying sculpture in an art gallery under a statute which permits newspaper and magazine publishers to show photographs of that sculpture in their publications and permits exhibition of paintings on the same theme.**

The statute under which appellant was convicted provides that it shall not apply to "an ornamental picture . . . or newspaper, or periodical. . . . "

Photographs of the sculpture exhibited by appellant were printed in Life Magazine (R. 82) without fear of prosecution. There is no conceivable rationale for permitting photographs of sculpture to be published in newspapers

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Peace in Nassau County. The emblem consists of a representation of the American flag with a peace symbol superimposed therein. *Long Island Vietnam Moratorium Committee* v. *Cahn*, currently pending E.D.N.Y.

Counsel herein represent at least five persons who have already been arrested in New York City for displaying the Women Strike for Peace emblem.

Appellant is not offended by the use of the flag by patriotic groups, or, even in a commercial context. He is offended, however, that New York State's law enforcement apparatus enforces the statute with particular severity against political dissenters.

and photographs and prohibiting an exhibition of the sculpture itself.

The equal protection clause of the Fourteenth Amendment forbids the State from arbitrarily discriminating between different classes of persons. Classification is permitted only when it is founded upon a rational policy, *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

It is difficult to imagine a sound justification for applying the statute to a person who exhibits sculpture, the appellant in the instant case, and not to one who publishes pictures of that sculpture or who exhibits paintings with the same theme. There can be no legitimate reason to permit in a periodical a use of the flag which is prohibited in a sculpture exhibit. The statute, therefore, engages in invidious discrimination between similar groups —artists who paint and those who sculpt, art gallery proprietors who exhibit paintings or photographs and those who exhibit sculptures and magazine and newspaper publishers and art gallery proprietors—and violates the equal protection clause of the United States Constitution.

## CONCLUSION

**For the reasons stated above the decision of the New York Court of Appeals should be summarily reversed, or, in the alternative, jurisdiction over the appeal herein should be noted.**

Respectfully submitted,

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# APPENDIX

**Majority Opinion of New York Court of Appeals**

STATE OF NEW YORK

COURT OF APPEALS

App. T. 1. No. 368. 69

THE PEOPLE &c.,

*Respondent,*

—v.—

STEPHEN RADICH,

*Appellant.*

## OPINION

UNREVISED AND UNCORRECTED. NOT FOR PUBLICATION.

GIBSON, J.:

The issue is whether defendant's conviction of a violation of New York's flag desecration statute was in contravention of his right of free speech under the First Amendment to the Constitution of the United States. The particular penal provision found to have been violated provides, in substance, that any person who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon the flag of the United States of America, either by words or act, shall be guilty of a misdemeanor (former Penal Law, §1425, sub. 16, par. d, now General Business Law, §136, subd. d). The constitutional question in respect of the proscribed defilement by an "act," rather than by "words," was expressly left open in *Street* v. *New York* (394 U.S. 576, 594), which reversed our af-

firmance of a conviction under this same statute (*People* v. *Street*, 20 N.Y.2d 231). We have concluded that the conviction in the case now before us infringed no constitutional guarantee.

The defendant, the proprietor of an art gallery in the City of New York, publicly displayed and exposed for sale, certain "constructions," comparable to sculptures, which had been fashioned by an artist as expressive of protest against the Vietnam war and which, in each case, prominently incorporated the American flag.

The complaint, upon which defendant was charged and convicted, alleged, among other violations of the statute, that defendant publicly displayed the flag of the United States of America in the form of the male sexual organ, erect and protruding from the upright member of a cross; also, in the form of a human body, hanging from a yellow noose; and, again, wrapped around a bundle resting upon a two-wheeled vehicle, shown by photographs in evidence to resemble a gun caisson.[1]

For the purposes of this opinion it seems necessary to discuss only the first of the constructions complained of. Testifying in his own behalf, the defendant said that this was protest art; and that during the exhibition of the

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[1] The allegations, in full, were that "the defendant did have on public display and for public viewing, the flag of the United States of America, in the following manner; 1—in the form of a male sexual organ, protruding from the body of form, in the anterior portion of the body of the form and depicting the erected male penis, protruding from a form of a cross. 2—the flag of the United States of America, wrapped in a chained bundle. 3—The standard of the United States on the form of an alleged elephant. 4—The Union of the flag of the United States of America, depicted in the form of an octupus [*sic*]. 5—The American flag attached to a gas meter. 6—The American flag wrapped around a bundle attached to a two wheeled vehicle. 7—The American flag in the form of a body, hanging from a yellow noose."

constructions, background music, consisting of war protest songs, was played from a tape. Asked, on cross-examination, as to the use of the flag for the purpose of protest, he said that the object extending from the vertical member of the cross and wrapped in a small flag was representative of a human penis; that tassels at the base of this protrusion represented "probably * * * decorative or pubic hair, depending on what one decides it looks like to him."[2] Asked as to the particular expression and protest intended to be conveyed, the witness said that perhaps the penis represents the sexual act, which by some standards is considered an aggressive act; that organized religion is also symbolized by the figure, which seems to suggest that organized religion is supporting the aggressive acts suggested.

Only recently this court had occasion to give extended consideration to section 1425 of the former Penal Law and specifically to paragraph d thereof. In *People* v. *Street* (20 N.Y.2d 231, revd. 394 U.S. 576, *supra*) we affirmed the conviction of a defendant who, upon hearing of the shooting of the civil rights leader James Meredith, took an American flag to a street corner, burned it, saying, "We don't need no damned flag," and made other statements to people who gathered to watch these actions, one of these being the arresting policeman, to whom defendant said: "If they let that happen to Meredith, we don't need an American flag." The crux of the defense was that defendant's acts and speech were proper forms of protest legitimized by the First Amendment. Synopsizing

[2] The "construction" was described in the majority opinion of the Criminal Court as "in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard."

Chief Judge Fuld's opinion upholding the conviction, we find the position of the court to be this: While nonverbal expression may be a form of speech within the protection of the First and Fourteenth Amendments, the same kind of freedom is not afforded to those who communicate ideas by conduct as to those who communicate ideas by pure speech; that the State may legitimately proscribe many forms of conduct and no exception is made for activities to which some would ascribe symbolic significance; that, in sum, the cases show that the constitutional guarantee of free speech covers the substance rather than the form of communication, but that if the substance is being conveyed by a form violative of the public health, safety or well-being, then the First Amendment protection is subordinated to the general public interest. With regard specifically to the flag desecration statute it was squarely held that it was a valid statute in that, regardless of the major motivating factor behind its enactment, there was a clear legislative purpose to prevent a breach of the peace; that the Supreme Court long ago in *Halter* v. *Nebraska* (205 U.S. 34, 41) stated: "[I]nsults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." This court said that our statute was designed to prevent the outbreak of such violence by discouraging contemptuous and insulting treatment of the flag in public.

The Chief Judge's opinion then noted that concededly defendant's acts arose out of indignation and a sense of outrage; that the act was one of incitement and as such threatened the public peace, a result which the State is legitimately interested in preventing. With regard to Street's purpose—to express indignation and protest—the

parallel to the case before us is clear. Here, the expression, if less dramatic, was given far wider public circulation and, in consequence, perhaps, a measurable enhancement of the likelihood of incitement to disorder, by the placement of one of the constructions in a street display window of defendant's gallery on Madison Avenue in the City of New York, and the exhibition and exposure for sale of the companion pieces in the public gallery and mercantile establishment within. Implicit in the invitation to view was the opportunity thereby afforded to join in the protest, or in counterprotest, with the consequent potential of public disorder; or so the trier of the facts could properly find.

The Supreme Court's reversal of *Street* (394 U.S. 576, *supra*) seems not to have questioned or disturbed the rationale enunciated here by Chief Judge Fuld. The majority felt that since it could not be determined what part of Street's conviction rested on the fact that he was charged with uttering constitutionally protected words and what part upon his act of setting fire to the flag, the conviction could not be upheld. The majority expressly left open the question concerning the validity of the conviction insofar as it was sustained on the basis that Street could be punished for flag burning "even though the burning was an act of protest" (p. 594).[3]

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[3] Thus, Mr. Justice Harlan, writing for the majority, said: "[W]e reiterate that we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest. Nor do we perceive any basis for our Brother WHITE's fears that our decision today may be taken to require reversal whenever a defendant is convicted for burning a flag in protest, following a trial at which his words have been introduced to prove some element of that offense." (*Street* v. *New York*, 394 U.S. 576, 594.)

The dissenters considered that the few words that Street uttered were part of the act of symbolic conduct, from which they could not be separated, and thus posed an issue which the majority opinion should have met.[4]

While it seems well established that a clear violation of a valid statute may not be saved on First Amendment grounds, it is necessary in this case eventually to reach a somewhat different question, which is, whether or not the act said to constitute the violation is tempered by the application of the First Amendment. In other words, while burning, spitting upon and stomping upon the flag are clearly and inherently disrespectful, do we reach a point where other acts may be performed with regard to the flag which do not so easily admit of the requisite contemptuousness; where the intent behind the act may be of the purest sort, but where the results of the act may nevertheless have the effect which, as Chief Judge Fuld found in *Street,* the statute was validly designed to prevent—the arousement of passions likely to lead to disorder? Before considering that problem, and in aid of its solution, it would be well to examine several significant recent cases.

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[4] The salient points of dissent may be quoted as follows: CHIEF JUSTICE WARREN: "Since I am satisfied that the constitutionality of appellant's conduct should be resolved in this case and am convinced that this conduct can be criminally punished, I dissent." MR. JUSTICE BLACK: "The talking that was done took place 'as an integral part of conduct in violation of a valid criminal statute' against burning the American flag in public. I would therefore affirm this conviction." MR. JUSTICE WHITE: "For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction." MR. JUSTICE FORTAS: "Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest." (394 U.S. 576, 605-617.)

In *Hoffman* v. *United States* (256 A. 2d 567 [Ct. of App., D. C., 1969]), the defendant, who was to testify before the House Un-American Activities Committee, upon approaching the House Office Building was arrested for desecrating the flag, in that he was wearing a shirt that resembled the American flag. He was convicted of breaching that part of the statute which proscribed defilement of the flag. On appeal to the District of Columbia Court of Appeals, Hoffman argued that the statute was vague, that he was entitled to First Amendment protection and that his acts did not constitute defilement since he undertook no physical destruction of the flag. On the vagueness question the court held that the statute admitted of that degree of reasonable certainty as to what could constitute a violation, so that it could not be said that a person possessing a reasonable degree of intelligence could not understand what conduct would be disrespectful to the flag and what conduct would not. The First Amendment argument was rather summarily disposed of, the court relying on the recently decided case of *United States* v. *O'Brien* (391 U.S. 367), a draft card burning case hereinafter discussed. Finally, the court held that wearing the flag, or part of it, as a shirt was a rather clear act of defilement in that the flag was thus dishonored; that the idea of dishonorment was the key to the question whether the flag was defiled. The court concluded (256 A.2d 567, 570) "that the use of the word 'defile' in the subject Statute was intended to include public conduct which brings shame or disgrace upon the flag by its use for an unpatriotic or profane purpose. It is our opinion that the wearing of a shirt which resembles the American flag, under the circumstances of this case, is a physical act which defiles the flag in violation of 18

U.S.C. §700. Such a use of the flag would 'degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor'. (*Halter* v. *Nebraska*, 205 U.S. 34, 42)." Similarly, in *People* v. *Cowgill* (—— Cal. App. 2d —— [78 Cal. Rptr. 853], app. dsmd. —— U.S. —— [38 U.S. Law Week 3266; Jan. 19, 1970]), the California court affirmed the conviction of a defendant for wearing a vest fashioned from a cut-up American flag, in violation of a flag defilement statute, the court posing and then answering affirmatively the question left open in *Street (supra)*, whether the States have power to protect the flag from acts of desecration and disgrace.

It is necessary to make reference, also, to the draft card burning cases of *United States* v. *Miller* (367 F.2d 72, cert. den. 386 U.S. 911) and *O'Brien* v. *United States* (376 F.2d 538). In *O'Brien*, the First Circuit held that a 1965 amendment to title 50 (§462, subd. [b]) of the United States Code, proscribing destruction of draft cards, was an unconstitutional abridgement of freedom of speech. The Supreme Court disagreed in *United States* v. *O'Brien* (391 U.S. 367, *supra*). The only dissent was that by Justice Douglas. The court, through Chief Justice Warren, noted that the statute on its face deals with conduct having no connection with speech. "It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. * * * A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." (391 U.S. 367, 375.)

It should be noted that O'Brien publicly burned his card on the South Boston Courthouse steps, a crowd having been attracted by his and his companions' activities. The draft card statute, like the flag statutes, had a legitimate reason behind its enactment.

One of O'Brien's contentions was that the action he took with his draft card was a communication of ideas by conduct and that this conduct expressed his position as regards the war and the draft. As to this the court stated: "However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. * * * a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression;* and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (391 U.S. 367, 376, 377; emphasis supplied.) Of those requisites the flag desecration statute need only be considered with respect to the one above emphasized.

The discussion thus far enables us to reach certain conclusions. It becomes clear, upon considering Chief Judge Fuld's statement in *Street* (20 NY 2d 231, *supra*), along with the authorities there cited, and the more recent cases discussed just above, that a person with the purest of intentions may freely proceed to disseminate the ideas in which he profoundly believes, but he may not break a valid law to do it. The flag statute has been repeatedly

held valid from the *Halter* case *(supra)* on down, even through *Hoffman* v. *United States (supra)* and *People* v. *Cowgill (supra),* where the flag was not, in either case, burned, spit or trampled upon, but was used, in each case, to further political or ideological viewpoints by employment as an article of clothing. There appears no significant difference between those situations and the one we are here considering. The defendant may have a sincere ideological viewpoint, but he must find other ways to express it. Whether defendant thinks so or not, a reasonable man would consider the wrapping of a phallic symbol with the flag an act of dishonor; he would consider the hanging effigy a dishonor; and to a lesser and more debatable extent it might be found that wrapping the flag in chains, attaching it to a gas meter, and fashioning the other representations involved, were acts dishonoring the flag. The exhibitor who, as in this case, engages to join the artist in the commercial exploitation of the supposed expression of protest stands in no better position.

There appears to be one further question with respect to the First Amendment which the *O'Brien* court (391 U.S. 367, *supra*) was not especially concerned with, having found the draft card law based upon the valid reason that registrants should be required to retain their cards simply to facilitate administration of the act. This question concerns itself with the requirement in *O'Brien,* emphasized above, that the governmental interest be unrelated to the suppression of free expression.

The *Halter* case (205 U.S. 34, *supra*), at which any investigation of the validity of flag statutes must begin, was decided at a time before the Supreme Court was as concerned with First Amendment rights as it is today. Thus,

the effect of *Stromberg v. California* (283 U.S. 359), the case cited by the majority in reversing the *Street* conviction (394 U.S. 576, *supra*), deserves consideration. Miss Stromberg conducted a daily ceremony at a children's summer camp during which the children raised the Soviet flag and recited a pledge of allegiance to it. The California statute made it a criminal offense to display a red flag (1) as a symbol of opposition to organized government, or (2) as an invitation to anarchistic action, or (3) as an aid to propaganda of a seditious character. Miss Stromberg was convicted under the statute, although it was not made clear which of the three criteria were involved in the breach. The court reversed on the ground that if defendant was convicted for flying the flag as a symbol of opposition, her First Amendment right to freedom of expression had been breached.

However, the statutes prohibiting certain kinds of exhibition of foreign flags, and statutes requiring the salute to our flag (cf. *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624) are clearly designed for no other purpose than communicative suppression whereas a flag desecration statute is aimed at keeping the public peace. While it is true that violations of the flag desecration statute will probably not occur apart from the expression of an idea, the prime reason for the statute was not to insure suppression of such ideas, but rather to insure preservation of the public peace. The *Halter* case (205 U.S. 34, *supra*) still expresses the law as rephrased in *Street* (20 N Y 2d 231, 236, *supra*), where it is stated: "In any event, whatever motivated the Legislature to act, the statutory purpose is clear—it is to prevent a breach of the peace."

Some enlightenment may also be gained from the implication to be drawn from the *Stromberg* case (283 U.S. 359, *supra*) that had defendant's conviction rested specifically on either or both of the statutory prohibitions relating to anarchistic or seditious actions, it might have been upheld. We thus conclude that the statute before us does not breach the *O'Brien* requirement (391 U.S. 367, 377, *supra*) that the governmental interest served by it must be unrelated to the suppression of free expression; and we affirm the lower court's conclusion that the legitimate public interest which the statute is designed to protect was threatened by the violation of which defendant was convicted.

Appellant's additional contentions are insubstantial and may be dealt with summarily. The statute is not unconstitutionally vague; and at least two of the "constructions" clearly cast the flag into dishonor. (*Hoffman* v. *United States*, 256 A.2d 567, *supra; People* v. *Cowgill*, —— Cal. App. 2d —— [78 Cal. Rptr. 853], app. dsmd. —— U. S. —— [38 U.S. Law Week 3266; Jan. 19, 1970], *supra.*)

Another argument is addressed to the factor of intent; but even if we assume that defendant had an honest political intent in exhibiting these constructions, or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum.* (*People* v. *Werner*, 174 N.Y. 132, 134; *People* v. Kibler, 106 N.Y. 321, 322-323.)

No less tenuous is appellant's claim of denial of equal protection, predicated on the provision exempting from the operation of the statute "a certificate, diploma, warrant, or commission of appointment to office, *ornamental picture,* article of jewelry, stationery * * * or newspaper

or periodical, on any of which shall be printed * * * said flag * * * disconnected and apart from any advertisement" (former Penal Law, §1425, subd. 16; emphasis supplied); and equally insubstantial is his contention based on the grammatical imperfection apparent in paragraph d of subdivision 16, it being clear beyond dispute that "flag" is the intended object, as it is the explicit object of every other act inhibited by the statute.

The order should be affirmed.

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The order should be affirmed.

## Dissenting Opinion of Chief Judge Fuld

I cannot agree with the majority that sufficient legitimate public interest is served by preventing the sale and exhibition of works of art—such as those which formed the predicate for the conviction of the defendant Radich—to justify interference with his right to free expression.

The defendant was the proprietor of a second-floor art gallery on Madison Avenue in New York City. He exhibited for sale seven sculptures, termed "constructions," by an artist named Marc Morrel, in which the latter made use of American flags—or what appeared to be parts of such flags—in various provocative shapes and forms to express protest particularly against the Vietnam War. (See Life Magazine, March 31, 1967, p. 22.) The defendant was charged with defiling and casting contempt upon the flag of the United States, in violation of section 1425, subdivision 16, of the former Penal Law.[1]

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[1] Insofar as relevant, subdivision 16 of section 1425 (now General Business Law, §136) provided:

"16. Any person, who * * *

"d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon * * * by * * * act, or

* * * * *

"f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, * * *

* * * * *

"Shall be deemed guilty of a misdemeanor; * * *

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be * * * said flag, standard, color, shield or ensign, of the United States of America * * * or a picture or a representation * * * thereof,

At the trial, the Art News Editor of the New York Times testified that he considered the sculptures or constructions to be works of art, more specifically, a form of "protest art" which (he added) was a long established type of art, exemplified by the works of such artists as Michaelangelo, Goya and Picasso. The defendant also testified, stating that, although the works express a political viewpoint, neither he, nor the artist intended to defile or cast contempt upon the flag. It was his belief, he asserted, that the artist, far from intending to do so, was seeking, rather, to convey the idea that others were contemning the flag by committing aggressive acts in its name.

The court, in affirming the conviction, places primary reliance upon *People* v. *Street* (20 N Y 2d 231, revd. on other grounds, 394 U.S. 576) in which we held that the State may legitimately circumscribe certain acts which are contemptuous of the flag. (See People v. Street, 24 N Y 2d 1026, 1028.) However, there is nothing in our opinion in that case which suggests that the mere fact that a person chooses to express himself by other than verbal means removes him entirely from the protections of the First Amendment. On the contrary, we wrote as follows (20 N Y 2d, at p. 235):

"It is the teaching of the cases that the constitutional guarantee of free speech covers the substance rather

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upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America * * *.

"This subdivision shall not * * * be construed to apply to a[n] * * * ornamental picture * * * on * * * which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

> than the form of communication and that the right to employ a particular mode of expression will be vindicated only if it has been outlawed not because of any legitimate State interest, but solely for the purpose of censoring the underlying idea or thought."

In other words, in the absence of a showing that the public health, safety or the well being of the community is threatened, the State may not act to suppress symbolic speech or conduct having a clearly communicative aspect, no matter how obnoxious it may be to the prevailing views of the majority. (See, e.g., *Tinker* v. *Des Manes,* 393 U.S. 503, 505, 509; see, also, Note, 68 Col. L. Rev. 1091; cf. *Cowgill* v. *California,* —— U.S. ——, 38 USLW 3266 [decided Jan. 19, 1970], *per* Harlan, J., concurring in dismissal of appeal.)

Quite obviously, the act which was prosecuted in the *Street* case—the public burning of a flag on a street corner in the Bedford-Stuyvesant section of Brooklyn—posed a threat to public order which the State could legitimately act to prevent. Indeed, we likened the public mutilation of a flag to "shouting epithets at passing pedestrians" (20 N Y 2d, at p. 237), a situation patently fraught with danger to the public peace. The same may not, however, be said of the art forms which the defendant before us displayed in the quiet surroundings of his upstairs art gallery on Madison Avenue in midtown Manhattan. In our modern age, the medium is very often the message, and the State may not legitimately punish that which would be constitutionally protected if spoken or drawn simply because the idea has been expressed, instead, through the medium of sculpture.

Unlike the situation in the recent case of *Cowgill* v. *California* (—— U.S. ——, 38 USLW 3266, *supra*),[2] the artist in the present case unquestionably made use of the flag for the purpose of expressing his political philosophy or views, his dissatisfaction with, and opposition to, the Vietnam War and other activities carried on by the Government. The challenged "constructions" were, in effect, but three-dimensional political cartoons. It is quite true that one's political motives may not be relied upon to justify his participation in an activity which is otherwise illegal. But it is equally true that an activity which is otherwise innocent may not be treated as criminal solely because of its political content.

Subdivision 16 expressly exempts from prosecution the display of the flag in "ornamental pictures," and, presumably, this exemption would apply to other forms of art as well. It is evident that the only reason why these works of Morrel were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message which those sculptures were intended to convey. In a very real sense, therefore, it was not the artist's *act* of making use of the flag which is being punished but solely the protest or the political views he was seeking to express thereby.

I have spoken principally of the artist who made the constructions in question. There is even less justification for proceeding against the owner of the gallery in which

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[2] In *Cowgill*, where there was no showing that the use of a cut-up, mutilated American flag was motivated by a desire to express a particular philosophy or point of view—where, in other words, the display had no "recognizable communicative aspect"—the court held that no substantial First Amendment question was presented. (See *Cowgill* v. *California*, —— U.S. ——, 38 USLW 3266, *supra*.)

the works were being exhibited for sale, particularly in view of the absence of any proof that he himself actually intended to defile or cast the flag in contempt. Although it is true that intent need not be an element of a crime—providing it is considered *malum prohibitum*—this is not the case where the challenged conduct involves the expression of political views. The First Amendment is designed not merely to prevent prosecutions but to actively encourage and foster the free dissemination of ideas. Thus, even activity which is not, in itself, subject to the protection of the First Amendment may not be prosecuted in a manner which will have a chilling effect upon the free dissemination of ideas. (See, e.g., *Smith* v. *California,* 361 U.S. 147.)[3]

In sum, I do not understand how it may reasonably be said that the mere display of Morrel's constructions in an art gallery, distasteful though they may be, poses the type of threat to public order necessary to render such an act criminal. This prosecution, in my view, is nothing more than political censorship falling far outside our holding in *People* v. *Street,* and may not be constitutionally sustained.

The judgment appealed from should be reversed.

* * * * * * *

Judgment affirmed. Opinion by Gibson, J. All concur except Fuld, Ch. J., who dissents and votes to reverse in an opinion in which Burke, J., concurs.

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[3] In the *Smith* case (361 U.S. 47), the court held that a bookseller could not be prosecuted for the sale of obscene material unless he was shown to be aware of the contents of the books. The rationale behind that decision—that absolute liability for the dissemination of unprotected material would chill the distribution of legitimate works which were subject to constitutional protection—is, it seems to me, equally applicable here.

## Majority Opinion of Trial Court

STRONG, P.J.

The defendant, an art dealer, publicly exhibited for sale at his gallery from December 13, 1966 to January 17, 1967, thirteen three-dimensional objects called "constructions." One of these objects (People's Exhibit 2) was in the display window and consisted of an American flag stuffed and shaped in a form suggesting a human body hanging from a yellow noose around its neck. Among the twelve other "constructions" inside the gallery was one (People's Exhibits 3 and 4) in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard. Other "constructions," all making use of the flag stuffed in various shapes, are described in the complaint herein and portrayed in the photographic exhibits.

This prosecution is brought under paragraphs (d) and (f) of subdivision 16 of Section 1425 of the Penal Law of the State of New York, originally enacted in 1903, which provide as follows:

> "16. Any person, who
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> "d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or
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> • • •
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> "f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word

or act, upon the flag of the United States of America, or

• • •

"Shall be deemed guilty of a misdemeanor;

• • •

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York.

"This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

The defendant moves after trial to dismiss the complaint on the ground that the facts as established do not constitute a violation of the statute and further that, in any case, the statute is unconstitutional for denial to the defendant of free speech, equal protection of the laws, and, because of vagueness, due process of law. Factually, the defendant contends that the "constructions" are a form of sculpture of a kind known as "protest art" and that no contempt for the flag was intended either by the artist or by himself. With particular reference to the cross-form, he claims that it expresses opposition by the artist to what he considers church-condoned American aggressive warfare in Vietnam as symbolized by the flag-wrapped phallus.

We hold that these so-called "constructions" constitute a contemptuous use of the flag of the United States and that the defendant by exhibiting them to the public cast contempt upon it in violation of paragraph (d) of the statute under which this proceeding was instituted. It will not do for the defendant to say that paragraph (d) by itself does not contain an object. Subdivision 16 must be read as a whole, and it is clear that the intended object is contained in the next paragraph, lettered "e," in the words "any such flag, standard, color, shield or ensign." We do not find paragraph (f) to be applicable to the facts presented here.

We further hold that these so-called "constructions" are not within the protection of the exclusionary paragraph of the statute. "Sculpture," if such these objects be, is not expressly exempted, and we see no valid basis for construing an implied exemption for it on the ground urged by the defendant that, "pictures" being expressly excepted, the omission of "sculpture" was a legislative inadvertence. In

any case, it is important to note that only pictures termed "ornamental" are exempted, and we are not prepared to find that the subjects of this prosecution are "ornamental" even by contemporary community standards. It seems clear to us that the legislative intent was to protect from prosecution the printed, painted, or affixed use of the American flag solely for ornamental, as distinguished from advertising, purposes. There is nothing in the statutory language to indicate that the legislature was concerned with the application of the First Amendment. As to these "constructions," it is, therefore, in our opinion of no consequence whether or not the word "pictures" in the exclusionary paragraph be deemed to embrace sculptures.

Obviously this case raises constitutional questions of fundamental importance. As a trial court, we must especially recognize the presumption supporting the validity of duly enacted legislation. The People having no right of appeal from an acquittal, we should not strike down this statute in the absence of a clear and overwhelming showing that it violates one or another of the guarantees set forth in the Bill of Rights. We fail to find such a decisive showing of unconstitutionality.

We do not find the statute here to constitute class legislation clearly in violation of the equal protection clause of the Fourteenth Amendment. As we have pointed out above, the section does not discriminate between pictures generally and sculpture generally. Only "ornamental" pictures are excepted. The legislature did not intend to say that pictures desecrating the flag would be exempted as a basis for prosecution and that similar sculpture would not be so protected. Any contemptuous use of the flag comes within the purview of the statute, whether two-dimensional or three-

dimensional. We find in this statute no arbitrary discriminatory classification.

We cannot find that the freedom of speech guarantee of the First Amendment includes a license to desecrate the flag. It is inconceivable to us that the authors of the Bill of Rights could have intended that the protection of the First Amendment could or should be stretched so far. The language of the Circuit Court of Appeals in *United States* v. *Miller,* 367 Fed. 2d at 79 (cert. denied), a draft card burning prosecution, is apropos. The Court there said: "• • • sincere motivation or the labeling of even nonviolent conduct as symbolic does not necessarily transform that conduct into speech protected by the First Amendment."

In the exercise of its police power, a State may restrict acts which pose an "immediate threat to public safety, peace or order" (*Cantwell* v. *Conn.,* 310 U.S. 296 at 308). In *Halter* v. *Nebraska,* 205 U.S. 34, 41, the Supreme Court, in upholding a statute similar to that involved here as applied to the use of the flag in advertising, said:

> "From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. • • • Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."

It seems to us that the prohibited use of the flag in advertising is less of a desecration and therefore less of a threat to public order than the use and exhibition of it in the so-called "constructions" here involved.

The United States Supreme Court decisions, cited by the defendant, in *West Virginia* v. *Barnette,* 319 U.S. 624, *Stromberg* v. *California,* 283 U.S. 359, and *Terminiello* v. *Chicago,* 337 U.S. 1 (cf. *Feiner* v. *New York,* 340 U.S. 315), arose from such different facts and statutes that we do not find them determinative of the issue here involved. In any case, we do not presume to make a final determination as to "where the individual's freedom ends and the State's power begins." The Supreme Court has said that our system places that duty upon it (*Thomas* v. *Collins,* 323 U.S. 516, 529).

In our opinion the language of the statute involved here is not so vague as to violate the due process clause of the Fourteenth Amendment. It seems to us clear enough to apprise any person of ordinary intelligence as to what it permits and what it prohibits. If he wishes to approach the brink of what is proscribed, he necessarily gambles on an adverse finding by the Court. Since we find the statute to constitute "malum prohibitum," no criminal intent to violate it is prerequisite to conviction. *People* v. *Boxer,* 24 N.Y.S.2d 628, 632.

Holding, as we do, that the act of the defendant in publicly exhibiting these so-called "constructions" cast contempt upon the flag of the United States and that no exception in the statute here involved exempted it and, further, that the statute as here applied does not clearly violate any constitutional provision, we find him guilty of the charge against him as set forth in paragraph (d) of subdivision 16 of Section 1425 of the Penal Law of the State of New York.

Comerford, J. concurs in this opinion.

Basel, J. dissents in his own opinion.

## Dissenting Opinion of Judge Basel

Defendant Radich is charged with a misdemeanor by reason of exhibiting and offering for sale in his art gallery a form of sculpture called "constructions" designed of American flags in forms described in the majority opinion. Defendant's gallery is well established in the New York art world. The exhibition was reviewed by art critics including the critic for The New York Times and was treated as a serious artistic offering. The works complained of, when displayed, were accompanied by a musical background of taped anti-war songs. The sound must be considered part of the exhibit. Modern artists often use additional media to accompany their visual creations to express their ideas more completely and to create a total effect. It is in the context of the anti-war theme, the statement the artist attempts to make must be judged. Defendant describes his efforts as "protest art." The creator of this work specifically protests America's participation and leadership in the Vietnam war.

There are many Americans in opposition to the war, who revere the flag and to whom, "it signifies government resting on the consent of the governed, liberty regulated by law, the protection of the weak against the strong, security against the exercise of arbitrary power and absolute safety for free institutions against foreign aggression." *Halter* v. *Nebraska,* 205 U.S. 34, 43. These loyal dissenters vehemently, honestly and passionately oppose U.S. intervention in Vietnam. They have devised varied means to express their opposition. This group argues, and many are veterans who fought to protect the flag, that the flag is being placed in contempt by our "aggression" and per-

sistence in this war. They protest that the image of the American flag as a symbol of freedom to lovers of liberty and a shining object to the oppressed is cast in contempt. This is the message the artist seeks to convey, in the work defendant exhibited. We may quarrel with his theme, disagree with his method, condemn his goal. We cannot dispute his right to express dissent even though the means be loathsome to us. " . . . laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men." *Board of Education* v. *Barnette,* 319 U.S. 624, p. 644. We can also not ignore the fact that large groups of Americans agree with his dissent, as witness the recent march of 100,000 upon the U.N. " . . . freedom to differ is not limited to the things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Board of Education* v. *Barnette,* supra, p. 642.

It is not the dissent for which defendant is prosecuted, we are told, it is the method that is condemned. It is the fact that the artist whose work defendant exhibits has chosen as his means of expression, to defile the flag by hanging it in effigy, draping it in chains, shaping it as a phallus on a cross, this opposition may no longer be characterized as free expression, it is contemptuous conduct. The sculptor cannot declare his dissent in this form, it is argued, because it violates and shames the symbol of our land and is thus a crime as defined in Penal Law Sec. 1425, Subdivision 16(d) and (f).

Defendant contends artist is not showing contempt for the flag. He supports what it symbolizes, liberty, equality, freedom, but he protests by means of these "constructions"

that those virtues have been abandoned by United States conduct in Vietnam. The ideals the flag represents, he argues, are enchained, its inspiration publicly hangs in shame before the world, and the church and state are jointly to be charged as violators of the innocent. He makes that protest visible, it takes sculptural form.

It is essential that legislation which is criminal in character be clearly drawn and precise so that those enforcing it will know its meaning and those subject to it can clearly regulate their conduct. If such legislation has a tendency to impair or impede free speech it must be judged ultra carefully. *Winters* v. *New York,* 333 U.S. 507, 509; *Stromberg* v. *California,* 283 U.S. 359; *Herndon* v. *Lowry,* 301 U.S. 242. As Judge Learned Hand said in *Masses Publishing Co.* v. *Patten,* 244 Fed. 535, 540: "Assuming that the power to express such opinion, (hostile criticism) may rest in Congress in the throes of a struggle for the very existence of the state, its exercise is so contrary to the use and wont of our people that only the *clearest* expression of such a power justifies the conclusion it was intended." Section 1425, subdivision 16(d) reads in full: "Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words, or act." It does not describe the object of this condemnation. Although a reading of the full statute (all of Section 1425, subdivision 16 might suggest it was a flag that was the legislature's concern, "16(d)" does not say so and it is the only subsection in 1425 (16) which omits the word "flag." It would be novel criminal law to convict anyone under such a statute, to read the word flag into it in order to obtain a conviction is in my view clearly unconstitutional.

The prosecution and the question is thus narrowed and confined to the validity of subsection 16(f) "shall publicly

carry or display any emblem, placard or flag which casts contempt, either by word or act upon the flag of the United States of America."

Who shall be the judge of what *word* or *act* is contemptuous? Which *act*, what *words* constitute contempt?

"The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime must be defined with appropriate definiteness." *Cantwell* v. *Conn.*, 310 U.S. 296; *Pierce* v. *U. S.*, 314 U.S. 306, 311. "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of an enactment . . ."

*Winters* v. *N. Y.*, 333 U.S. 507, 518. *U. S.* v. *Cohen Grocery Co.*, 255 U.S. 81.

In *Herndon* v. *Lowry*, supra, p. 263, the Supreme Court said: "The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." See also *People* v. *Bookcase, Inc.*, 14 N.Y. (2) 409, *People* v. *Kahan*, 15 N.Y. (2) 311.

The statute in the instant case is drawn so broadly and is so vague that any words or any acts to which someone in authority takes offense can be deemed criminal. " . . . the constitutionality of a statute governing publications is to be tested by what *can* be done under it and not by the *particular* violation which is charged with having occurred."

*People* v. *Bookcase,* supra, p. 418. The 100,000 who marched upon the U.N. are critical of the uses to which the flag is being put in Vietnam, as are Senator Fulbright, Senator Hatfield and thousands of others. Are they guilty of a crime if they *say* the flag has been placed in chains by United States conduct? No one would seriously argue they be jailed for expressing verbally or in writing what the artist here makes visual. I agree with defendant's art expert that the artist's talent is limited, his symbolism obvious, cliche and lacking in imagination. I acknowledge he has chosen a means of expression in extreme poor taste and shabby in form. But is he to be punished for his lack of manners and his vulgarity when his intention is a serious condemnation of our present foreign policy? Who is to judge under this statute if what he did is unlawful? If those who marched in opposition are his judges, it is doubtful they will find his conduct contemptuous. If those who hurled insults at the parade were on his jury, they would almost certainly find him guilty. "A person gets from a symbol the meaning he puts into it." *Board of Education* v. *Barnette,* supra, p. 633. "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *U. S.* v. *Cohen Grocery Co.,* supra, p. 89. The legislature has established standards so vague, indefinite, imprecise and subjective, the statute under discussion should be held unconstitutional. As Chief Justice Hughes said in *Stromberg* v. *California,* supra, p. 369, "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system. A statute which upon its face . . .

is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

*Halter* v. *Nebraska*, supra, relied upon by the People and the majority opinion and followed in *People* v. *Picking*, 288 N.Y. 144, is distinguishable. In a recent case involving disrespect for the flag, in Federal District Court, Southern District, although the court did not take jurisdiction for procedural reasons, it said: ". . . . the substantive constitutional issues are not insubstantial. This view can scarcely be altered by *Halter* which was decided several years before the protections of the First Amendment were held firmly applicable to the states through the Fourteenth Amendment. However, the argument that the statute is unconstitutional for vagueness was notably absent in the *Halter* case." P. 7. *Dunncombe* v. *State of N. Y.*, U.S. DC So. Dist. N.Y. 67, Civ. 1085 April 11, 1967, Bryan J. *Halter* also passed only on the advertising provisions of Section 1425. These are more carefully drawn than 1425, 16(d) and (f), and are more detailed and not vague. *Halter* is further distinguished by the fact that advertising is not yet protected by the First Amendment.

The other argument advanced by defendant, that the statute intends to exempt all forms of expression as protected by the First Amendment and that all sculpture as well as all painting is included in the descriptive term in the statute, "ornamental painting," does not require discussion in view of the opinion here expressed as to the unconstitutionality of the statute.

The motion to dismiss should have been granted and the defendant found not guilty. I dissent from the majority view.

## Opinion of Three-Judge Court in Hodsdon v. Buckson

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

Civil Action No. 3500

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WILLIAM M. HODSDON,

*Plaintiff,*

v.

DAVID P. BUCKSON, Attorney General of the State of Delaware, and RUTH M. FERRELL, Deputy Attorney General of the State of Delaware,

*Defendants.*

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William E. Taylor, Jr., of Taylor & Lindh, Wilmington, Delaware, for plaintiff.

David P. Buckson, Attorney General of Delaware and Ruth M. Ferrell, Deputy Attorney General, for defendants.

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Wilmington, Delaware
March 18, 1970

Before SEITZ, *Circuit Judge,* and WRIGHT and LAYTON, *District Judges.*

WRIGHT, District Judge.

Plaintiff William M. Hodsdon is here seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§2201-2202 and 42 U.S.C. §1983. Specifically, he requests this court to declare a section of the Delaware Code, 11 Del. C. §532, unconstitutional, and to enjoin defendants David P. Buckson, Attorney General of Delaware, and Ruth M. Ferrell, Deputy Attorney General, from continuing to prosecute him for a violation thereof. This three-judge court was convened because requests for relief invoke the provisions of 28 U.S.C. §§2281-2284.

The state indictment of which plaintiff here complains is the culmination of a series of efforts to cause him to cease using his American flag to express displeasure with United States involvement in the Vietnam war and with what he considers various civil injustices. The state of Delaware first brought an action in the United States District Court for the District of Delaware seeking to enjoin plaintiff's display of the flag inconsistent with the flag etiquette provisions of 36 U.S.C. §§174-178. The District Court dismissed that action for lack of jurisdiction. State of Delaware ex rel. Trader v. Hodsdon, 265 F. Supp. 308 (1967).

On April 18, 1967, defendants secured an indictment in the Delaware Superior Court against plaintiff for violation of 11 Del. C. §532. That section reads, in relevant part, as follows:

> "Whoever publicly mutilates, defaces, defiles, defies, tramples upon or casts contempt either by word or act upon (the American flag)— Shall be fined not more than $100 or imprisoned not more than 30 days, or both."

The indictment charged that plaintiff had violated the act at numerous times beginning in July, 1966, by

> "displaying simultaneously on the front of his residence at 3202 Fernwood Place, Wilmington, Delaware, the United Nations flag in the position of honor on the right side of his house and the United States flag in the subordinate position on the left side of his house and flown in a half-mast position."

Plaintiff moved to dismiss the action in the state court. His motion was denied, as was his request for a writ of prohibition from the Delaware Supreme Court. 239 A.2d 222 (Del. 1968). He then instituted this action on March 14, 1968. This Court heard argument on motions to dismiss and plaintiff's motion for summary judgment. Decision was deferred by agreement among the parties[1] so the Court could have the benefit of an impending decision of the United States Supreme Court thought to deal with the issues here. Street v. New York, 394 U.S. 576 (1969).

Plaintiff urges this Court to declare the statute unconstitutional "in that it abridges plaintiff's right of freedom of speech," and on the ground "that it is impermissibly vague and indefinite."

If plaintiff attacked the statute solely for its vagueness, it would be necessary to decide if a narrowing construction by the state courts "would avoid or modify the constitutional question." Zwickler v. Koota, 389 U.S. 241 (1967). The possibility of such construction would require abstention from needless intervention in state court proceedings. Harrison v. NAACP, 360 U.S. 167 (1959). Here, however,

[1] Defendants agreed not to proceed with the pending prosecution until a decision in this action.

plaintiff also attacks the statute on its face, and if no conceivable construction[2] will repair, unconstitutional infirmities, abstention is both unnecessary and improper. Zwickler v. Koota, supra, at 249-252.

Having carefully examined this statute, giving due presumption to its validity, the Court concludes that no construction could remedy its impermissible intrusion into areas of expression protected by the First Amendment. The Court cannot abstain, and, for reasons hereafter stated, holds that 11 Del. C. §532 is unconstitutionally overbroad.

As Mr. Justice Harlan pointed out in *Zwickler* overbreadth and vagueness are not always easy or profitable to distinguish. 389 U.S. at 255-257 (concurring opinion). Statutes which suffer from one often suffer from the other.[3]

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[2] In his letter opinion denying the motion to dismiss in the state court, Judge Quillen gave a lengthy construction of the statute. He said:

> As I interpret the crucial statutory words used in this indictment, their purpose is to convict those who publicly and intentionally commit acts or speak words either calculated to defile, defy, or cast contempt upon the American flag or done with a callousness as to their result in that regard. It is inconceivable to me that our legislature intended this statute to be used to convict those who inadvertently damage the flag. *Compare State* v. *Tabasso Homes, Inc.*, 3 Terry 110, 28 A.2d 248, 254 (Gen. Sess. 1942). More specifically, I interpret the statutory words involved here to require not only that the acts alleged be acts which dishonor the flag in the mind of a reasonable man, but also that they be done by the defendant with the intent so to dishonor the flag or with a conscious indifference to that result. I think this follows from the words themselves, "defile, defy, or cast contempt . . . upon." Page 6 of letter opinion dated January 15, 1968.
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> Whether or not his construction represents the final opinion of the Delaware courts on the meaning of the statute would present a nice question, but one this Court need not decide. Neither that construction nor any other would remedy the statute's basic defect.

[3] Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 871-876 (1970).

This Court understands overbreadth to be the statutory result when the legislature, having the power to regulate certain conduct, strikes so bluntly as to proscribe constitutionally protected conduct as well. See Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.R. 67, 96-97 (1960), and Note, *The First Amendment Overbreadth Doctrine,* 83 Harv.L.R. 844 (1970). Whether the overbroad sweep results from a clear intent to regulate both types of conduct, or from use of vague and confusing terms, the defect is fatal.

The danger of chilling the exercise of fundamental freedoms, especially those protected by the First Amendment, requires that when the conduct regulated approaches a protected zone, government regulate "only with narrow specificity." "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," because those freedoms need "breathing space to survive." NAACP v. Button, 371 U.S. 415, 433, 438 (1963).

As the Supreme Court noted in *Button,* the objectionable aspect of overbreadth is not the absence of fair notice of the statute's import, but rather the danger of tolerating "a penal statute susceptible of sweeping and improper application. . . ." Id. at 432-433. In Shelton v. Tucker, 364 U.S. 479, 488 (1960), the Court said:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when that end can be more narrowly achieved."

See Note, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 464 (1969). The Delaware statute attacked

here is capable of an application so sweeping and improper that even if some of its goals may constitutionally be reached,[4] it must fall in its entirety, lest protected expression be deterred by fear of prosecution.

No cases provide clear precedent for the holding here, but several decisions of the Supreme Court offer guiding principles. In Street v. New York, 394 U.S. 576 (1969), the defendant asserted that his conviction under a New York statute[5] substantially identical to the one attacked here abridged his freedom of expression. To protest the shooting of civil rights leader James Meredith, Street burned an American flag on a Brooklyn street corner. As the flag burned, he exhorted a small crowd, "We don't need no damn flag . . . . If they let that happen to Meredith we don't need an American flag."

The Supreme Court agreed with Street that the conviction abridged his freedom of expression. It based the holding, however, on the fact that the statute permitted him to be convicted either solely for the contemptuous words which accompanied his burning the flag or for the combination of words and act. His words, said the Court, were protected by the First Amendment and could not constitutionally support a conviction.

The Court identified four governmental interests that might be furthered by punishing Street for his words: (1) an interest in preventing him from vocally inciting others to commit unlawful acts; (2) an interest in preventing him from uttering words so inflammatory that they

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[4] Four justices had no doubt, at the time of *Street* v. *New York*, *supra*, that the state could punish the act of burning the flag. See dissenting opinion of the Chief Justice and Justices White, Black, and Fortas in that case.

[5] N. Y. Penal Laws §1425, subd. 16, par. d.

would provoke others to retaliate physically against him, causing a breach of the peace; (3) an interest in protecting the sensibilities of passersby who might be shocked by Street's words about the American flag; (4) an interest in assuring that Street, regardless of the impact of his words on others; showed proper respect for the national symbol. None of those interests, concluded the Court, could constitutionally justify a conviction under the statute. The Court had " . . . no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." Street v. New York, supra, at 593.

The Supreme Court intimated no opinion in *Street* as to the constitutionality of efforts to punish *acts* alone which "mutilate, deface, defile or defy, trample upon, or cast contempt upon" the flag. Defendants here urge that the "words" portion of the Delaware statute is severable, and that insofar as the "acts" portion is concerned, *Street* made no determination of its validity. This Court agrees. The crucial issue, therefore, is whether, although the state may not by a statute like the one here punish words defiant or contemptuous of the flag, it may nevertheless punish acts which convey identical ideas.

Expression is not confined to the spoken and written word. A court may take judicial notice of the symbolic significance of particular acts.[6] Nor is expression deprived of

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[6] *United States* v. *O'Brien*, 391 U.S. 367 (1968); see also the footnote to Mr. Justice Harlan's opinion concurring in dismissal of the appeal in *Cowgill* v. *California*, 38 USLW 3266 (1970).

constitutional protection because it is nonverbal. In Stromberg v. California, 283 U.S. 359 (1931), a state statute forbidding display of a red flag "as a symbol of opposition to organized government or as an invitation or stimulus to anarchistic action" was held unconstitutional. More recently, in Tinker v. Des Moines School District, 393 U.S. 503 (1969), the Court held that wearing black armbands for the purpose of expressing opposition to the war in Vietnam was closely akin to "pure speech" and that, inasmuch as it was not associated with any actually or potentially disruptive conduct, it was beyond the regulatory power of school authorities. Thus, although acts are not beyond regulation because they have symbolic components,[7] in the absence of factors justifying limitation, symbolic speech is constitutionally protected. This Court takes judicial notice of the symbolic significance of flying the American flag. Like the conduct in *Tinker*, it is closely akin to "pure speech," and if a statute attempts to regulate it in furtherance of no interest other than suppression of expression, this Court has no choice but to strike that statute down.

Defendants maintain that laws such as this one are legitimate exercises of the state's police power. The state has a strong interest in protecting the national symbol and encouraging patriotism, as well as in preventing breaches of the peace surely ensuing from desecration of that symbol, they say, and individual liberties must yield when restraints are reasonable and directed to those interests. Halter v. Nebraska, 205 U.S. 34 (1907); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Adderley v. Florida, supra; Cameron v. Johnson, 390 U.S. 611 (1968).

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[7] *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1948); *Adderley* v. *Florida*, 385 U.S. 39 (1966).

Defendants urge that the instant case is controlled by the rationale of United States v. O'Brien, 391 U.S. 367 (1968), and United States v. Miller, 367 F.2d 72 (2d Cir. 1966) cert. den. 386 U.S. 911. Those cases held that the national interest in efficient administration of the selective service system justifies limitation of freedom to burn one's registration card as a protest. In *O'Brien*, the Court said:

> ". . . when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitation on First Amendment freedoms." 391 U.S. at 376.

Accordingly, argue defendants, the strong interest in regulating the nonspeech elements in conduct associated with the flag justifies incidental intrusions on whatever speech elements may be involved.

That the state has an interest in the preservation of the national symbol is not disputed. Nor is it questionable that the interest permits some types of regulation, to the detriment of asserted freedoms. Halter v. Nebraska, supra; Cowgill v. California, 78 Cal. Rptr. 853 (1969), appeal dismissed 38 USLW 3266. The Court said in *O'Brien*, however, that a government regulation is justified if it meets four criteria:

(1) It is within the constitutional power of the government;

(2) It furthers an important or substantial governmental interest;

(3) The governmental interest is unrelated to the suppression of free expression; and

(4) The incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. U. S. v. O'Brien, supra, at 377.

The Court distinguished *O'Brien* from a case "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." Specifically, the Court distinguished *Stromberg* v. *California,* supra: "Since the statute there was aimed at suppressing communication, it could not be sustained as a regulation of noncommunicative conduct." Id. at 382.

In the present case, although nonspeech elements are present in the conduct regulated, the statute is so broad that it strikes where no interest is served other than the proscription of expression. Unlike the statute sustained in *O'Brien,* narrowly drawn and clearly directed to the preservation of a national administrative scheme, this law encompasses acts which bear no relation to any interest within the legislative competence and which are intended and understood as symbolic speech.

11 Del. C. §532 does not, for example, limit itself to deviations from orthodox display procedures. It is directed not to rules, if they exist, governing display of the flag, but to the attitude displayed by the person who flies it. If there are limitations on the protection afforded conduct by the First Amendment, they are defined by exigencies other than the prevention of public expression of attitudes—even those of defiance or contempt. That Amendment indeed guarantees the right to express such attitudes toward the government, and it is the strength of our democracy that they

are tolerated in almost all their public manifestations. That tolerance is not only a benefit flowing from diligent protection of fundamental freedoms; it is a *sine qua non* of their continued enjoyment.

Nor does the statute limit itself to those who fly the flag. Any act which casts contempt upon or defies it, whether affecting it physically, or not, is potentially illegal. Gestures or salutes which identify unpopular or controversial groups may apparently be forbidden. Defendants themselves have indicated that schools in Delaware may invoke the statute to forbid students to render the so-called "clenched fist" or "black power" salute to the flag at athletic events.[8]

In Barnette v. West Virginia Board of Education, 319 U.S. 624 (1943), the Supreme Court held that a state could not make performance of a flag salute and pledge of allegiance a condition of free public education, and refusal tantamount to delinquency. It noted that the state's employment of the flag "as a symbol of adherence to government as presently organized" inevitably cast the issue as one of expression. "It [the state] requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." 319 U.S. at 633-634.

The teaching of *Barnette* is that the state cannot compel a gesture of adherence to the American flag. Whether under some circumstances the state can forbid gestures of nonadherence, disapproval or contempt is not decided there nor in any other decision brought to the attention of the Court. The statute attacked here, however, makes no effort

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[8] See Attorney General's opinion to Mr. Roger C. Mowrey, Asst. Supt. Administrative Services, Department of Public Instruction, dated September 17, 1969, on the question "May the practice by students and nonstudents of raising their hands in a 'black glove salute' at public school sporting events legally be restricted?"

to limit the facts and circumstances under which such gestures are forbiddden. The Court believes that the rationales of *Barnette* and *Stromberg* together compel the conclusion that the punishment of peaceful symbolic acts rejecting the political ideas bespoken by the flag is as alien to the mandate of the First Amendment as is compulsion to signify adherence. That this statute proceeds, heedless of the guarantees of that amendment, to proscribe such acts determines its invalidity.

The state does, of course, have an interest in preventing breaches of the peace, and this decision does not derogate from the power to control disruptions ensuing from public desecration of the flag. Such power is inherent in the sovereignty of states, and legitimate means of exercising it are available. Chaplinsky v. New Hampshire, supra, Feiner v. New York, 340 U.S. 315 (1951). But cf. Cantwell v. Connecticut, 310 U.S. 296 (1940). Efforts at preventing breaches of the peace have run aground only when they failed to assure that only speech which actually incites to violence, or which is "likely to provoke the average person to retaliation" is forbidden. Chaplinsky v. New Hampshire, supra, at 574. As the Supreme Court stated in *Street,* such statutes must be "carefully drawn so as not unduly to impair liberty of expression." Nothing in 52 Del. C. §532 safeguards against impairment of that liberty when the public order is not threatened. The attempted application to plaintiff belies any such limitation.

In *Street,* the Supreme Court commented that "disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history." We agree. Nevertheless, that the times are difficult and that the issues are emotional calls for more, not less, diligence in safe-

guarding our cherished freedoms. The often quoted lines from *Barnette* are as apt today as they were in 1943:

> "The case is made difficult not because the principles of its decisions are obscure, but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.
>
> . . . . . .
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> We have individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. . . . But freedom to differ is not limited to things that do not matter much. That would be the mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by *word* or *act* their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (Emphasis added). 319 U.S. at 641-642.

The statute here challenged includes within its ambit expression protected by the United States Constitution. The failure of the legislature to regulate with particularity and specificity in this not too clearly charted area of First Amendment rights poses a danger of chilling vigorous and

important debate and compels the Court to hold the statute unconstitutional.

Plaintiff also requests that defendants be enjoined from proceeding further against him under the act now declared unconstitutional. This Court finds no reason to assume that the state of Delaware or its officers will attempt to deny plaintiff full protection of his First Amendment rights, nor does it find in the record any of the factors discussed in Dombrowski v. Pfister, 380 U.S. 479 (1965), Cameron v. Johnson, 390 U.S. 611 (1968) and Zwickler v. Koota, supra, necessary to justify such extraordinary relief. No injunction shall issue, without prejudice to plaintiff to request of this Court such relief should subsequent events require it.[9]

Submit order.

COLLINS J. SEITZ
*United States Circuit Judge*

CALIB M. WRIGHT
*United States District Judge*

CALEB R. LAYTON
*United States District Judge*

Wilmington, Delaware.
March 18, 1970

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[9] That injunctions under 42 U.S.C. §1983 are exceptions to the prohibition against injunction of state court proceedings contained in 28 U.S.C. §2283 is clear from the recent decision of *Grove Press Inc.* v. *City of Philadelphia*, 418 F.2d 82 (3d Cir. 1969), and the earlier case of *Cooper* v. *Hutchinson*, 184 F.2d 119 (3d Cir. 1950).

## Order of Court of Appeals Below

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of February in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,
*Chief Judge, Presiding.*

RAYMOND J. CANNON,
*Clerk.*

REMITTITUR February 18, 1970.

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App. T. 1. No. 368.

THE PEOPLE &C.,

*Respondent,*

VS.

STEPHEN RADICH,

*Appellant.*

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BE IT REMEMBERED, That on the 22nd day of August in the year of our Lord one thousand nine hundred and sixty-nine, Stephen Radich, the appellant in this cause, came here unto the Court of Appeals, by Richard G. Green and Shirley Fingerhood, his attorneys, and filed in the

said Court a Notice of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Richard G. Green, of counsel for the appellant, and by Mr. Jerry Slater, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON,
*Clerk of the Court of Appeals*
*of the State of New York.*

COURT OF APPEALS, CLERK'S OFFICE,
Albany, February 18, 1970.

(Seal)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
*Clerk.*

## Statute Involved

SECTION 1425, PENAL LAW OF NEW YORK (now GENERAL BUSINESS LAW, §136)

"16. Any person, who * * *

"d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon * * * by * * * act, or

* * * * *

"f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, * * *

* * * * *

"Shall be deemed guilty of a misdemeanor; * * *

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be * * * said flag, standard, color, shield or ensign, of the United States of America * * * or a picture or a representation * * * thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America * * *.

"This subdivision shall not * * * be construed to apply to a[n] * * * ornamental picture * * * on * * * which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."